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# Lynn Johnstun v. J. H. Harrison : Brief of Appellant

Utah Supreme Court

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George S. Stewart; Patterson and Bayles; Attorneys for Defendant;

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**In the Supreme Court  
of the  
State of Utah**

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**LYNN JOHNSTUN,**  
*Plaintiff and Respondent*

**vs.**

**J. H. HARRISON,**  
*Defendant and Appellant*

Case No.

7174

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**Brief of Appellant J. H. Harrison**

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**ILED**

**APR 23 1948**

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**UTAH SUPREME COURT, UTAH**

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# In the Supreme Court of the State of Utah

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LYNN JOHNSTUN,

*Plaintiff and Respondent*

vs.

J. H. HARRISON,

*Defendant and Appellant*

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7174

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BRIEF OF APPELLANT J. H. HARRISON

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## STATEMENT OF THE CASE

On November 4th, 1947, there was an election held for the election of City Councilmen in the City of Roosevelt, Duchesne County, State of Utah. At such election, defendant and appellant, J. H. Harrison, and plaintiff

and Respondent, Lynn Johnstun, each were candidates for election to the office of City Councilman.

There were two political parties, one known as the Peoples Party and one known as the Progressive Party. There were three councilmen to be chosen for the city.

The name of plaintiff, Lynn Johnstun, appeared under the Peoples Party Emblem and the name of defendant, J. H. Harrison, appeared under the emblem of the Progressive Party. Thus, there were three councilmen on each party ticket.

At said election, the plaintiff, Lynn Johnstun, received 205 votes and the defendant, J. H. Harrison, received 207 votes. Defendant Harrison was then issued a certificate of election. The plaintiff initiated this contest, and the statement of contest, so far as material here, alleges as follows:

“7. That in counting the ballots in each of the said election districts the election judges did in a great number of instances fail to count for plaintiff ballots in which persons had marked their x in the square opposite the name of the plaintiff when no line was drawn through the name of the person on the opposite ticket. That in many instances voters would vote the emblem in and for the Progressive Ticket, and then the same voters made an x in the square opposite the name of plaintiff, and in counting such ballots, the judges would and did refuse to count such votes for plaintiff.

"8. That several ballots, the exact number of which are unknown to plaintiff, were marked in the party emblem circle of the Progressive Party, and the voter would mark an x in the square opposite one of the three candidates for 2 year City Councilman whose name appeared under the Peoples party column, but nothing appeared on such ballots to disclose which of the three candidates for 2 year city councilman on the Progressive Ticket the voter intended eliminate by having voted for three thereunder and one on the Peoples party, and under such ballots the judges of election did eliminate the vote for the person voted for individually on the Peoples party ticket, and the name opposite the name of such candidate as it appeared on the Progressive Partys ticket.

That by such erroneous counting of such ballots for defendant, he received and was given more than two votes which he was not entitled to have had counted for him, that were in fact counted for him." (Record 88)

Defendant Harrison duly demurred to the Statement of Contest in the following language :

"That said Statement of Contest and Complaint does not state sufficient facts to constitute a cause of action for an election contest against this Defendant and Contestee.

"Defendant and contestee demurs specially on the ground that the plaintiff and contestant has not complied with Section 25-14-4 Revised Statutes of Utah 1943 in that the correct name of either plaintiff and contestant or defendant and contestee is not shown; in that said statement of contest and complaint does not show what election

district of the City of Roosevelt of which the plaintiff and contestant is a resident; that the grounds of contest are ambiguous, unintelligible and uncertain and do not state a cause of action against this defendant and contestee.

“And in particular that the allegations of said statement of contest and complaint do not allege facts sufficient to overcome the presumption of legality of the certificate of election duly issued to the defendant and contestee as shown by the said complaint.” (Record 90)

This demurrer was overruled by the Court. (Record 3)

This case was tried by the court on the 23rd day of February 1948” (this is error as the case was tried before the court on January 23, 1948). The court made findings on the evidence on the purported issues. (See Record 97 to 100)

The court then concludes from the Findings that the plaintiff, Lynn Johnstun, was elected to the office of two-year city councilman of the city of Roosevelt, and decree was entered accordingly, declaring the election of the plaintiff, Lynn Johnstun. (Record 98)

That in counting the votes before the court there were 69 ballots which were rejected by court and counsel as not being voted for either plaintiff or defendant. There were five ballots marked Exhibits which appear in the record, two of which were counted by the court for plaintiff and three for the defendant. (Rec. 75-77)

That not one of the 69 and not one of said five votes were voted in the manner set forth in either or all of the plaintiff's statement of contest.

In other words, there was no evidence whatever to support any of the allegations of the plaintiff's complaint or statement of contest.

There was voted and counted for the contestant two Ballots, Exhibits 2 and 3, wherein two voters voted by check mark very similar in design, from which the judges of election, who may have had some information upon the subject, might readily agree that the two votes so cast and so similar were voted as a means of identification. (Rec. 71 and 72)

That the court allowed costs to the contestant in the sum of \$64.80. (Rec. 103)

One ballot was cast at the election for the contestee J. H. Harrison. The stub was not detached from the ballot, but placed in the ballot box with other ballots. The court rejected this vote for the contestee. (Rec. 73)

In the trial of said cause it was stipulated that not one ballot was found in the 69 votes which was rejected by court and counsel wherein the voter had voted the emblem on the progressive ticket and one on the peoples ticket, or for the contestant on the peoples ticket.

It was further stipulated that there was no evidence which justified the opening of the ballots. The record on this stipulation as to district No. 1 is as follows: (Rec. 68)



“MR. PATTERSON: Just a minute. I would like to make a record in relation to this. I would like to call the court’s attention to the fact that in our counting of the ballots there is no instances where the circle was voted and four votes cast.

THE COURT: Do you want to make anything for the record on that, Mr. Dillman?

MR. DILLMAN: No.

THE COURT: All right, the record may so show.”

At the end of the count, (Rec. 75) the following appears as to Districts Nos. 1 and 2:

“Mr. PATTERSON: May I make a record at this time with reference to the votes which were cast for neither, which have been rejected by this court. That no vote was voted where the emblem was voted and where one vote was cast upon the other side, thus constituting voting for four. There is only one instance in the votes rejected, that is, in the no-count votes, where four was voted, and in that instance they voted in the square of the Progressive ticket and voted for Lawrence Pack under the People’s ticket with a cross, voting for four. I call the court’s attention to that.

Then let me add on to that also, Your Honor, that there is no evidence in the record whatever to show the situation where two ballots were cast under the progressive ticket and one ballot was cast under the People’s ticket. In other words, that the ballots clearly disclose that there is no evidence for the order opening the ballots.

THE COURT: What do you want to do about it, Mr. Patterson?

MR. PATTERSON: Well, I might as well. Your Honor, ask the court to set aside the count.

THE COURT: Well, do you want to do it? Are you making a formal motion? Your drawing the attention of the court to it doesn't mean a thing, either here or in the Supreme Court. If you want the court to do anything about it, make your record, and then we will rule upon it; then we will have it here and also in the Supreme Court.

MR. PATTERSON: By reason of the fact that the counted Ballots, and especially those ballots which have been rejected as to both sides, clearly show that there is no evidence in support of the proposition to open the ballots, we now move that the count be set aside and that the defendant herein be declared the duly elected, qualified and acting councilman of the City of Roosevelt.

THE COURT: Do you resist that, Mr. Dillman?

MR. DILLMAN: Yes.

THE COURT: Here is the court's view on that matter, and the record may show it. The evidence respecting errors or unlawful votes is required. The plaintiff has the burden of proving that there were errors or there were unlawful votes received, or that there were lawful votes rejected, and sufficient to change the result of the election if the errors had not been made. The plaintiff is required to prove that by a preponderance of the evidence. And that is a preliminary requirement to the opening of the ballots. The matter is thus *res adjudicata* upon the determination of the court on the opening of the ballots, and the ballots themselves are not competent evidence to establish the preliminary requirements for the opening of ballots.

The court is conscious that such may admit of perjured testimony. In the event that any witness has wilfully testified falsely he is responsible under the criminal laws. And if there has been perjured testimony, then proper proceedings should be had to hold the perjurer responsible under the criminal laws.

But as far as the contest itself is concerned, the evidence did, by a preponderance of the evidence, not only justify but required the order of opening. The opening has been made, the ballots have been counted, and if there has been a different situation shown on the count of the ballots, it cannot affect the order for opening or the determination of the grounds for the opening. Thus that becomes *res adjudicata* in the case. Therefore, the motion will be denied.

MR. PATTERSON: Exception." (Rec. 76)

*The rule that the ballots are the best evidence of how the one voted, must apply also to the proposition as to whether they were voted in the manner alleged in plaintiff's complaint.*

## STATEMENT OF ERROR

### THE COURT ERRED AS FOLLOWS:

1. In overruling the defendant's demurrer to the plaintiff's complaint. (Rec. R3)
2. In opening the ballot pouches, there being no pleading or evidence to justify the same.

3. In its Findings of Fact as set forth in our statement of the Case, upon which its conclusions and decree were entered. (Rec. R. 97)

4. In its conclusions of law.

5. In its Decree. The same not being supported by any evidence or by any finding.

6. In decreeing that the contestant Lynn Johnstun was elected to the office of the two-year City Councilman of the City of Roosevelt, Utah, at the election held in Roosevelt on the 4th day of November, 1947.

7. That the evidence is insufficient as a matter of law to justify the findings of the court, the conclusions and the decree entered pursuant thereto.

8. The plaintiff, by his pleadings, did not conform to 25-14-4 UCA 1943 in that he did not identify himself as the plaintiff and the defendant as J. H. Harrison as required by subdivisions 1, 2 and 3 of 25-14-4 UCA 1943. (See Complaint Rec. P. 83)

9. That there was voted and counted for the contestant two ballots, Exhibit 2 and 3, wherein two voted by check mark very similar in design from which the judges of election, who may have had some information upon the subject, might readily agree that the two votes so cast and so similar were voted as a means of identification. (Rec. 71 and 72)

10. That the court allowed costs to the contestant in the sum of \$64.80. (Rec. 103)

11. That the court refused to count for the defendant one ballot found in the ballot box and voted for the defendant, to which the stub of the ballot was attached.

## ARGUMENT

The complaint presents three proposals for alleged erroneous counting of ballots:

### *PROPOSAL NO. 1:*

“7. That in counting the ballots in each of the said election districts the election judges did in a great number of instances fail to count for plaintiff ballots in which persons had marked their x in the square opposite the name of the plaintiff when no line was drawn through the name of the person on the opposite ticket. \* \* \*

### *PROPOSAL NO. 2:*

“That in many instances voters would vote the emblem in and for the Progressive Ticket, and then the same voters make an x in the square opposite the name of plaintiff, and in counting such ballots, the judges would and did refuse to count such votes for plaintiff.”

### *PROPOSAL NO. 3:*

(See Paragraph 8 of the complaint as set out on page 84 Rec.)

*Point No. 1, to-wit, “The court erred in overruling*

defendant's demurrer to the plaintiff's complaint'' (Rec. 3):

To facilitate the argument on this point, we produce a sample ballot used at the election insofar as it relates to the three councilmen voted for:

**PEOPLE'S PARTY**

**PROGRESSIVE PARTY**



For councilman—2-year

For councilman—2-year

LYNN JOHNSTUN



ELMER ELDREDGE



For councilman—2-year

For councilman—2-year

LAWRENCE PACK



J. H. HARRISON



For councilman—2-year

For councilman—2-year

SAM G. WEISS



NORMAN MURPHY



On proposal No. 1 it is observed that the contestant says he was not given a ballot because there was a cross after his name which we have indicated in the above sample.

This only tells half the story as a cross under the emblem of the Progressive Party would entirely eliminate his right to that vote, and likewise a cross after the names of the three 2-year councilmen on the Progressive Party would entirely eliminate his right to such vote. Therefore, it is obvious this point does not state a cause of action.

*On proposal number 2* the complaint says that the voter voted the emblem on the Progressive Party and then put a X for the plaintiff's name under the People's Party, and complains that this vote was not counted for him.

The law governing the counting of these ballots is set forth in 25-6-21 *Laws of 1947*, which reads as follows, insofar as material here :

“\* \* \* \* When two or more officers are to be elected to the same office, the voter may vote for the candidates for such office for whom he desires to vote, provided, that if he marks more squares than the aggregated number of names to be filled on such ticket, the vote shall be rejected as to such officer. If a voter has placed a cross in the circle at the head of the ballot and wishes to vote for a person on another ticket for an office for which more than one person is to be elected, he shall scratch through the names of the persons of the party under whose emblem he has marked a circle, for whom he does not wish to vote.”

Thus it will be seen that counsel's proposal No. 2 does not state a cause of action because the plaintiff would not be entitled to such vote. A ballot so voted under proposal number 2 votes for four councilmen when only three can be elected, and the law plainly says that the vote shall be counted for none of them.

*Proposal Number 3:* This statement is ambiguous and uncertain. Apparently the plaintiff means to say: That the emblem is voted under the progressive ticket. Then the voter marks a cross for someone of the three councilmen under the People's ticket. That means voting for four, and therefore none should count. There is no one scratched under the Progressive ticket. But he goes on to say: The judges then eliminated the vote for the person voted for under the People's ticket, and also the name opposite the name of such candidate as it appeared on the Progressive ticket. This means nothing. For instance, turn back to the sample ballot above and place a cross after the name of Lawrence Peck under the People's party. Then his allegation would mean that the name of J. H. Harrison opposite the name of Lawrence Peck would likewise be eliminated. If this were true, it would not affect the vote for Lynn Johnstun in any manner. Surely Proposal No. 3 does not state a cause of action.

Then, again, under this point one, we direct the court's attention to Assignment No. 8 under statement of error hereof, wherein it is clear that the plaintiff has



not complied with the clear mandatory provisions of 25-14-4 UCA 1943, in failing to properly identify himself and to properly identify the defendant, and also failing to give us a clear statement of the matters complained of.

*Points Nos. 2 to 7 inclusive*, with reference to the Findings, Decree and evidence may be considered together.

Suffice it to say that there was nothing in the pleadings to support the findings and nothing in the pleadings to support the evidence on behalf of the plaintiff and nothing in the pleadings which justified the court in making its order to open the ballots. In other words, we could admit the entire allegations of the complaint and there would be nothing to justify the court in opening the ballot pouches.

*Point 8* is incorporated under point 1 going to the necessary allegations of the complaint.

*Point 9*: Here is presented the two exhibits which the court counted for the complainant. They were voted by check marks. Just two of them in the entire record and in the same district, and voted precisely alike except as to one candidate. Such voting could readily serve the purpose of identifying the two ballots, and furthermore the election judges may have had some specific information that they were so identified.

It is true that under the new statute this court has held that a vote shall not be denied where a check mark is used in lieu of the cross, but it does not appear that the situation was such as to give rise to the identification of ballots thus cast.

*Point 10:* The court in this case allowed costs to the contestants. Of course, there are many instances in election contests where costs should properly be allowed, but we cannot believe that our statute is all-controlling in cases of this character. The man whose right to office, and who has been inducted into office, is challenged, has no recourse as a citizen having been elected to public office but to defend the position to which he was elected.

It was his duty to do so and while he did enter into the contest in defense of his office, he might have refused to answer or reply to the contest; the court nevertheless would have been required to summons the same witnesses and go to the same expense of trial which was pursued in this case, and yet the cost would fall upon the defendant. This appears to us to be materially unfair, especially when no extraordinary cost was caused by the defendant himself. He stood upon his rights and claimed the office, but did not call a witness. In any event we feel that the \$64.80 costs charged against him are improper.

*Point 11.* The election judges are set up by law to control the voting of the elector. These judges permitted this vote with the stub attached, to be placed in the bal-

lot box. It was clearly their own duty to see that the ballot, after it was voted, was properly disposed of; that is to say, it was their duty to see that the stub was detached before the ballot was dropped into the box. This is purely an error of the election judges and not of the voter. That is not all. When the ballots come out of the box for counting they should then have detached the stub and placed it where it belonged and counted the ballot for the defendant. This was denied to him.

We come now to a general discussion of points from one to 7 inclusive and point out to the court wherein we insist that the pleading and evidence was insufficient to justify the opening of the ballots. Please refer to the stipulation set forth in Rec. 68 and 75.

It will be observed that both court and counsel agree that there was not one ballot voted as alleged in the plaintiff's complaint. After the evidence was in, this matter was called to the attention of court and counsel, and virtually stipulated that there was no evidence supporting the complaint and no ballots cast as alleged in the complaint.

The court took the position, however, that even though there was perjury in the execution of the complaint and perjury in the evidence relating to the voting, that, nevertheless the court could do nothing about it; that our remedy was by criminal prosecution; that the matter of determining whether the ballot pouches should

be opened was *res adjudicata* even though the testimony upon that point was perjured and even though the verification of the complaint was likewise a perjury.

We believe that it is the rule that courts do not set aside a verdict or decision on the ground of perjured testimony, except in specific cases in equity, but we do not believe that the trial court was justified in side-stepping this issue when the perjury appeared, as shown by the stipulation, in the course of the trial.

Let us look at the findings of the court upon this particular point: In its summary of findings, we find the following:

“The court at the conclusion of the evidence did determine and find that votes *had probably* been counted for the contestee to which the contestee was not entitled, in sufficient number that it would change the result of the election.” (Rec. p. 99)

So we see that the trial court's idea was, that if there was *probable cause* to believe that the results might be changed, gave to the court the right to open the ballots.

We do not so understand the law. Before ballots can be opened there should be a *prima facie* showing, founded upon competent testimony, under the pleading, that there would be sufficient change in the count, under the allegations of the complaint, to justify the opening of the ballots. A Decree cannot be entered upon a *probable* state of facts.

In this connection, let us quote from the exaggerated testimony offered by the plaintiff :

Q. Mr. Harrison, now referring specifically to a ballot, if there were any, in which the Progressive emblem had been voted, and a cross placed opposite the name of Lynn Johnstun under the People's ticket, describe how that was counted.

A. As I said before, —

Q. The names are all on the board there and you can see the relative position if you want to look.

A. Yes, I know exactly. A number of times they would vote for Lynn Johnstun, put a cross in front of Lynn Johnstun's name there, and unless there was — as I remember, they didn't count that at all unless there was a scratch through some name on the other ticket, unless there was a line drawn through.

\* \* \* \*

Q. Now, how many ballots did you observe in which a cross was placed opposite the name of Lynn Johnstun, and similar to that which has been described to you, in which the ballot was not counted for Lynn Johnstun?

\* \* \* \*

A. I would say no less than thirty or forty ballots." (Rec. 9-10)

This testimony came from the chief witness of the contestant, and he readily testified that there were "30

or 40'' ballots marked in the emblem of the Progressive ticket and also voting for Johnstun on the People's ticket, which ballots were counted for no one. (Rec. 7-8-9)

Other testimony of like character and extravagance was given. But no such ballots were found in the re-count, as shown by the stipulation. (Rec. 68 and 75)

We think the authorities are not in conflict to the effect that, in an election contest, just the same as in all civil suits, the pleadings must be supported by the evidence; and finding supported by pleading. Citing authorities: *Hamer v. Howell*, 31 Utah, 144, 86 Pac. 1073:

“While the weight of authority holds that statutes governing contested elections should be liberally construed in order that justice may be done, we do not understand that this rule of liberal construction may be extended so as to overturn the well-established rule of practice that the *evidence must be confined to the issues raised by the pleadings, and that the judgment rendered must conform thereto*. And our attention has been called to no case which holds that in proceedings of this kind, or, for that matter, in any other class of civil actions, questions may be tried and determined which are entirely outside of the issues. In the case of *Boardman v. Griffin*, 52 Ind. 101, in the course of the opinion, the court says: ‘The parties must recover upon the allegations of the pleadings. They must recover *secundum allegata et probata* or not at all. It must be so from the nature of things, so long as our mode of administering justice prevails. It would be folly to re-

quire the plaintiff to state his cause of action and the defendant to disclose his grounds of defense, if, on the trial, either or both might abandon such grounds and recover upon others which are substantially different from those alleged.' This case is cited with approval in *Borders v. Williams*, 155 Ind. 36, 57 N.E. 527, where it is said: 'We perceive no ground for the contention that in contested election cases the procedure is more liberal than on the trial of other civil causes with respect to the issues and evidence. The statute requires the contestor to specifically state in his complaint the grounds of contest relied upon.' (Many cases cited.)

"Counsel for appellant contend that the matters embraced in the challenges referred to come within and are covered by the first alleged ground of contest set forth in the complaint and designated as 'ground No. 1,' and which is set out in full in the foregoing statement of facts. By an examination of that paragraph of the complaint, it will be seen that it alleges a conclusion only, and contains no statement of fact. Now the same general rule of civil pleading which requires the plaintiff to set forth in his complaint the facts upon which he bases his right for relief governs in this class of cases. In fact subdivision 4, Sec. 917, Rev. St. 1898, provides that the contestant shall set out in his petition 'the particular grounds of contest,' and section 919 in effect provides that this shall be done, 'with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested.' In 15 Cyc. 405, this same rule is announced as follows: 'In statutory proceedings to contest an election the contestant's initial pleading, whether it

be termed a declaration, complaint, petition, or notice and statement, must set forth the particular facts relied upon as invalidating the election of his opponent in order that the latter may be apprised of the case he has to meet. Thus an allegation that the contestant received more votes than the contestee is an averment of a conclusion, \* \* \* and when pleaded as an independent ground of contest will be regarded as surplusage." (Emphasis ours)

The case of *Hamer v. Howell*, supra, is cited with approval in the case of *Frantz v. Hanson*, 104 Utah 112, 140 Pac. 2d 636.

To show that the rules of pleading must be complied with, we find the following in this case of *Frantz v. Hanson*:

"We find that Frantz was really the one elected, but in the absence of a cross appeal our judgment can go only so far as to hold that Hanson cannot prevail on his appeal, which leave the judgment as the lower court made it." (Frantz failed to file a cross-appeal, an essential of pleading and procedure.)

Bearing upon this question and also upon the sanctity of a certificate of election, the Colorado court, in the case of *Quigley v. Phelps*, 132 Pac. 742, had this to say:

"In conclusion, we say that if the Legislature had intended that the entire vote of any county, and for the same reason, of every county in the state, should be recounted upon mere demand (and that is what the appellants' contention amounts



to) it would have been easy to so state. If it was intended that the certificate of election based upon the official count by the election officers should have no force as against an unsupported charge of fraud or incompetence on their part, and that official action shall no longer possess even a prima facie presumption of rectitude, then the legislature should have so stated. If such is to be declared the public policy of this state, then the functions of election officials will become an idle form. Much time and expense would be saved by simply limiting their duties to a mere reception and sealing the ballots and delivering them to the courts for counting in the first instance.

“We find no abuse of discretion in the refusal of the trial court to recount the ballots, in the absence of any evidence of mal-conduct on the part of the election officials.”

We quote the following from the case of *Evans v. Reiser*, 78 Utah 253, 2 Pac. 2d 615:

“\* \* \* Exhibit 414 has a part of the top torn off. We must assume that this ballot was not so torn when it was handed to the judges of election after the voter had marked his ballot. The judges of election are required to tear off the stub of the ballot after it has been marked and before it is placed in the ballot box. If the ballot was torn before it was handed to the judges of election, it is difficult to see how the stub could have been attached. In the absence or proof to the contrary it must be assumed that the judges of election performed their duty, and if they performed their duty Exhibit 414 must have been torn after the ballot was marked by the voter.

“\* \* \* The electors cannot be disfranchised by declaring their votes void for an act or omission of some election officer, or some one else, unless such act or omission violates some express constitutional or statutory provision, or amounts to intimidation or fraud.

“Under such circumstances, the respondent may not be heard to complain. The failure of the judges of election to draw six excessive ballots from the ballot box in district 54 may not be taken advantage of by the respondent where, as here, it appears that the failure of the judges of election to perform their duty in such respect did not and could not change the result.”

Further quoting from 25-6-21, Laws of 1947:

“No ballot furnished by the proper officer shall be rejected for any error in stamping or writing the indorsements thereon by the officials charged with such duties, nor because of any error on the part of the officer charged with such duty in delivering the wrong ballots at any polling place, *but any ballot delivered by the proper official to any voter shall, if properly marked by the voter, be counted as cast for all candidates for whom the voter, had the right to vote, and for whom he has voted.*” (Emphasis ours)

In conclusion let us say:

First: The trial court, counted out the contestant two votes ahead of the contestee. If the ballot cast for the contestee, from which the stub was not detached, were given to the contestee and the two ballots voted by check

mark, which the trial court gave to the contestant, were deducted from the trial court's figures, the contestee would have one vote in excess of the contestant.

Second: We believe that the courts of this state are assuming a more strict attitude as time goes on with reference to the evidence required for a recount. Just to permit any one to come in with any kind of a false statement, unsupported by evidence, and secure the recount of ballots, presents us with the greatest subterfuge and fraud in such matters thus far encountered. The door would certainly be wide open for the recounting of ballots upon a mere supposition that a recount, regardless of allegations of complaint, would change the results. We insist such is not the law.

Third: We respectfully submit that the certificate of election, duly issued to the contestee, cannot be impeached by the pleadings in this case, and certainly not on the stipulated evidence.

We very respectfully submit that the decision of the trial court should be reversed.

Respectfully,

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